UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

- Against - :

MARTIN AVALO, :

Defendant. :

---X

1:16 Cr. 108-01 (WHP)

Defendant's Sentencing Memorandum

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Dated: New York, New York
March 17, 2017

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INTRODUCTION

Defendant MARTIN AVALO is presently scheduled for sentencing before this Court on March 17, 2017, at 3:00 p.m., pursuant to his guilty plea to one count of Conspiracy to Commit a Hobbs Act Robbery, a Class C Felony in violation of 18 U.S.C. § 1951. This memorandum is submitted in support of Mr. Avalo's request for a sentence of imprisonment that will run fully concurrent with the sentence previously imposed by Judge Andrew L. Carter (13 Cr. 811 (ALC)), followed by a reasonable period of supervised release with conditions that will enable him to address and overcome the various factors that have influenced his past criminal behavior.

Mr. Avalo is currently serving a sentence of 49 months' imprisonment, which was imposed by Judge Carter on September 18, 2015, following his guilty plea to one count of Conspiracy to Burglarize Pharmacies of Controlled Substances (18 U.S.C. § 2118(d)), and one count of Conspiracy to Distribute and Possess with Intent to Distribute Narcotics (21 U.S.C. § 841(b)(1)(C)). In formulating a reasonable sentence that will properly advance the goals and purposes of criminal sentencing enumerated under 18 U.S.C. § 3553(a), it should be emphasized that Mr. Avalo has been in federal custody since October 30, 2013, and that he was indicted in this case several months after he was sentenced by Judge Carter for criminal offenses that (1) took place around the same time as the conduct at issue in this case, and (2) involved many of the same defendants. The indictment in this case was filed soon before the expiration of the applicable 5-year statute of limitations, and after Mr. Avalo had already pleaded guilty in his case before Judge Carter. Thus, his Criminal History Category—which was determined by Judge Carter to overstate the seriousness of his criminal record [July 16, 2015 Tr., at 18-19.]—has been further inflated by the bifurcation of what should have been one criminal prosecution, and it now *substantially* overstates the seriousness of his criminal history. *See* U.S.S.G. § 4A1.3(b); *United States v. Mishoe*, 241 F.3d 214, 219 (2d Cir. 2001).

Thus, in light of the fact that Mr. Avalo is already serving a sentence of 49 months' imprisonment and has already been in federal custody for nearly three years and three months, it is submitted that an additional period of incarceration beyond the time he will already be serving would be "greater than necessary" to advance the goals of rehabilitation, deterrence, incapacitation, or retribution.

DISCUSSION

Mr. Avalo is a 37-year-old man who has made many mistakes in his life, but his potential for rehabilitation and redemption is evident. Unfortunately, he has not been given many chances in life thus far, and while he has had frequent run-ins with the criminal justice system, it appears that arrests, prosecutions, and prison sentences are not the type of interventions that are needed to effectively address the factors underlying his criminal behavior.

When he was a child he was repeatedly subjected to sexual abuse, and after he was given a prescription for legal opiates as a teenager he soon became addicted. From there, his drug use spiraled out of control, and he began engaging in criminal activities largely as a means of supporting his habits.

There is no reason to hope or expect that the criminological factors that have influenced Mr. Avalo's behavior will somehow be remedied or alleviated by way of an extensive period of imprisonment. *See generally United States v. Bannister*, 786 F. Supp. 2d 617, 658 (E.D.N.Y. 2011) (noting that "[e]xcept for the incapacitation effect of incarceration, there is little apparent correlation between recidivism and the length of imprisonment.").[1] In light of his personal history, and in consideration of the evident psychological and drug addiction problems underlying his criminal behavior, there is good reason to believe that the 49 months he will already spend in federal custody is sufficient to punish him for that behavior—including his conduct at issue in this case—and that a reasonable period of monitoring and supervision by the U.S. Probation Office during a term of supervised release will be the best way to ensure that he is able to re-enter society, pursue steady work in the construction industry, as he intends to do, and work to put his troubled history behind him for good.

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[1] *See also* Daniel S. Nagin, Deterrence in the Twenty-First Century, 42 Crime & Just. 199, 201-02 (2013) (noting that with respect to *specific* deterrence "there is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation. Instead, the evidence suggests that reoffending is either unaffected or increased."); William Kelly, The Future of Criminal Punishment, at 52 (2016) (noting that with respect to *general* deterrence, "the evidence is clear that there is no scientific support for a general deterrent effect from harsh punishment. While

I. The Pre-Sentence Report and the Advisory Federal Sentencing Guidelines

Mr. Avalo and I have reviewed the November 21, 2016 Presentence Report ("PSR") prepared by U.S.P.O. Smyla Jones, and the Guidelines calculation provided therein is accurate and is in accordance with the September 16, 2016 plea agreement signed by Mr. Avalo and by the government. Therefore, with a base offense level of 20, pursuant to U.S.S.G. § 2B3.1(a), with a six-level increase for use of a firearm, a two-level increase for a victim who sustained a bodily injury during the course of the offense, a two-level increase for a victim who was physically restrained, and an additional two-level increase for an offense involving carjacking, pursuant to § 2B3.1(b)(2)(B), (b)(3)(A), (b)(4)(B), and (b)(5), the offense level for count one is 32. Because Mr. Avalo has accepted responsibility for his

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prosecutors and judges often articulate general deterrence in sentencing decisions, the research indicates that it does not matter.").

offense conduct—as he did previously when he pled guilty before Judge Carter in connection with his prior recent case—he qualifies for a three-level reduction pursuant to § 3E1.1(a) and (b), yielding a total offense level of 29.[2]

With a Criminal History Category of VI, the advisory Federal Sentencing Guidelines recommend a sentence of 151 to 188 months' imprisonment, one to three years of supervised release, and a fine range of $15,000 to $150.000.[3] The applicable statutory provisions provide for a maximum sentence of 20 years' imprisonment, with no applicable mandatory minimum sentence (18 U.S.C. § 1951), a maximum of three years' supervised release (18 U.S.C. § 3583(b)(2)), a maximum fine of § 250,000 (18 U.S.C. 3571(b)), and a special assessment of $100 (18 U.S.C. § 3013).

II. 18 U.S.C. § 3553(a): A Reasonable Sentence

Pursuant to specific statutory direction, criminal sentences should be "sufficient, but not greater than necessary" to reflect the seriousness of the offense, protect the public, afford adequate deterrence and promote the defendant's rehabilitation. § 3553(a)(2). The effect of this "overarching provision," *Kimbrough v. United States*, 552 U.S. 85, 101 (2007), is to ensure that courts impose sentences in recognition of the fact that the Guidelines are a "marker on the path toward a reasonable sentence," but are "no longer necessarily the ultimate destination on that path," *United States v. Jasper*, 2005 WL 2414547, at *6 (S.D.N.Y. 2005). *See also United States v. Dorvee*, 616 F.3d at 182 (2d Cir. 2010) ("Even where a district court has properly calculated the Guidelines, it may not presume that a Guidelines sentence is reasonable for any particular defendant, and accordingly, must conduct its own independent review of the § 3553(a) sentencing factors."). In *United States v. Fernandez*, the Second Circuit noted that "[c]onsideration of the § 3553(a) factors is not a cut-and-dried process of factfinding and calculation; instead, a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts." 443 F.3d 19, 29 (2d Cir. 2006).

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[2] The applicable offense level and criminal history category are the same whether or not Mr. Avalo is considered a Career Offender, pursuant to § 4B1.1(b)(3), [*See* PSR at ¶¶ 44-45, 69.]

[3] As the PSR notes at paragraph 101, Mr. Avalo has no assets and no income. He is therefore unable to pay a fine.

Mr. Avalo accepts full responsibility for his offense conduct, and he does not contend that it was in any way justified. However, it is also true that Mr. Avalo's offense was not motivated by rank greed or by some anti-social or predatory impulse, and it is submitted that the most effective way to prevent him from reoffending in the future is to effectively address the drug addictions and the other long-standing psychological factors that have contributed to his criminal behavior, something that a lengthy prison term simply cannot and will not accomplish.

III. The Nature and Circumstances of the Offense

Because this Court is familiar with the facts and circumstances of this case, many of which are detailed in the PSR and were discussed during Mr. Avalo's plea allocution, this submission will not recount them in great detail. However, there are circumstances unique to Mr. Avalo's offense and his post-offense conduct that should be considered in fashioning an appropriate punishment. These circumstances are not presented as an attempt to excuse Mr. Avalo's conduct in connection with the charged offense or to shift the blame for his conduct and the consequences of that conduct onto others. However, they are relevant to the formulation of a sentence that would ensure Mr. Avalo's rehabilitation, deter him and others from engaging in future criminal conduct, and appropriately punish him for his conduct in this case.

Mr. Avalo pleaded guilty to count one of the instant indictment before Your Honor on September 22, 2016, and he candidly allocuted to his involvement in the charged offense. Since that time, he has continued to accept responsibility for his crime and he has not in any way attempted to obstruct justice or impede the Government's investigation or prosecution. [PSR ¶ 33.] He did not lead, direct, or manage other individuals in connection with the charged offense, he is not and has never been involved with a gang, and there is nothing about his involvement in this or any other case to indicate that his criminal behavior is the product of anything other than financial desperation paired with a long-term addiction to drugs.

IV. Mr. Avalo's Personal History

Martin Avalo was born in 1979 to Maria Castillo and Pablo Avalo. While his parents worked hard to provide a good life for him and his brothers, his father was often working abroad in the Dominican Republic, and his mother would frequently leave him in the care of neighbors while she was away at work. When he was only four years old, the neighbors in whose care he had been placed sexually abused him, and they continued to do so for the next several years. Multiple people in the same family, adults and their children, molested him on a regular basis, and he recalls that when he finally told his parents about the abuse his own father beat him for "making a story up."

Martin and his brothers, both of whom have criminal records and have served time in prison, were less than ideal influences on each other when they were children. When Martin was not in the care of his abusive neighbors he and his brothers were often left unattended, and they looked up to and emulated people in their community who were involved in drug activities and other criminal behaviors.

When he was only 12 years old, Martin began smoking marijuana on a regular basis. Then, when he was a teenager, he received a prescription for Percocet after he broke his elbow. He soon found himself addicted to the medication, and he continued to abuse the drug for years. Martin's brothers have struggled with their own drug addictions, and like Martin they have engaged in criminal activities in order to facilitate their access to drugs. While

Martin received some treatment for his Percocet addiction in 2002, he did not successfully overcome his habit at that time, and he eventually began to burglarize pharmacies and commit other crimes along with other people in order to feed his habit.

Martin dropped out of school in the 11th grade, and he did not get a GED certificate until six years later, in 2002. He has held jobs as a messenger, a non-union construction worker, and a shoe store employee, and as the PSR reflects he paid taxes when he was working. Unfortunately, however, for much of his post-adolescence he has been in and out of the criminal justice system, culminating with his federal arrest in October 2013. As he notes in his letter to this Court, Martin has begun taking electrician classes at Fort Dix, and he hopes to be sent back there after his sentencing so that he can complete those classes and put himself in a better position to find work in the construction industry upon release. [Ex. A.]

Martin and his mother always had a close relationship, and he recalls that when he was a child and he informed her that he was being sexually abused by their neighbors she, unlike his father, believed him. Unfortunately, soon before he was sentenced by Judge Carter in connection with his other federal case, Martin's mother died, and he was unable to attend the funeral services. The fact that he was not able to be present for the last moments of his mother's life has, perhaps more than anything, made him realize how his short-sightedness and his poor choices have negatively impacted him and those who are closest to him. This realization, combined with the fact that he will be spending the next few years in federal prison and may be in his 40's when he is ultimately released, has prompted him to reevaluate his life to a degree that he had never considered before. As he informed Judge Carter at the time of his sentencing, he plans to begin working a construction job with MS Builders when he is released, and he has also reached out to representatives of the Doe Fund, who have informed him that he would qualify for one of their non-residential programs upon release. [Sept. 18, 2015 Tr., at 3, 7.]

Those who know Martin best attest to his kind nature, and while they recognize that he has made bad decisions in the past, they also know that there is much more to him than the worst things he has done. In her letter to this Court, attached hereto as Exhibit B, Martin's niece, Jerlyn Avalo, recalls that Martin "has always been a father figure to me."

> He has always been the support system in the family. Throughout the years things at home have been very difficult [and] Martin was always the person to pay the bills in the house [and] to buy my grandmother's and grandfather's medicine. * * * He is a wonderful person[,] he is caring, hardworking and loving, and I say that because that was what he has always showed his family[.] [Ex. B.]

V. The Goals and Purposes of Criminal Sentencing

In considering the need for rehabilitation in this case, this Court is respectfully reminded that 18 U.S.C. § 3582(a) provides that "imprisonment is not an appropriate means of promoting correction and rehabilitation." *See also Untied States v. Tapia*, --- U.S. ---, 131 S.Ct. 2382 (2011). To the contrary, it is evident that the time that Mr. Avalo has spent in jails and prisons in the past have not addressed the various factors underlying his criminal behavior, and there is no reason to believe that on *this* occasion a lengthy period of imprisonment would somehow help him to overcome the problems that led him to make bad decisions and engage in criminal behavior.

The goal of deterrence would not be furthered by the imposition of an additional sentence of imprisonment. Mr. Avalo needs to obtain good vocational training, rejoin society, find legitimate work, and overcome his drug addictions. *That* is what will deter him from committing future crimes. Any additional period of time beyond the sentence he is already serving that will keep him away from society, warehoused with other criminal offenders, and unable to pursue legitimate work will only hinder, rather than hasten, his progress.[4]

Incapacitation by way of a harsh prison sentence would also not provide a benefit to society. Mr. Avalo is not an inveterate criminal mastermind who needs to be kept away from society. Most of his prior offenses are low-level crimes that were clearly related to his problems with drugs, and if he finally begins to receive effective treatments there is no reason to believe that he will need to be locked up for a lengthy period of time in order to keep anyone safe. Indeed, as noted above, a lengthy sentence of incarceration would only exacerbate the various obstacles that Mr. Avalo has faced and will continue to face as a result of his past drug use and his prior criminal convictions, and it would do nothing to help him move forward in life and put his criminal history behind him.

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[4] It is submitted that the imposition of an extensive prison sentence would not only be greater than necessary to deter Mr. Avalo specifically, but it would also likely fail to advance the goal *general* deterrence. *See generally* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 818 (2010) (noting that "[t]he safest conclusion from the literature thus far would be that the perception of certain legal and extralegal sanctions does seem to act as a modest deterrent factor, *but that the perceived severity and celerity of punishment do not appear to be effective deterrents to crime*[.]") (emphasis added). It should also be noted that Mr. Avalo's offense, which took place nearly five full years before the date of his indictment in this case, preceded his arrest, plea, and sentence before Judge Carter in connection with his other case. Therefore, it cannot be said that the federal sentence he is currently serving was not adequate to deter him with respect to his offense conduct at issue in this case.

Therefore, it is submitted that an appropriate sentence in this case should include substantial and effective drug treatment, psychological counseling, supervision, and job-placement assistance during a reasonable period of supervised release, to be preceded by a concurrent sentence of incarceration to account for the seriousness of his offense. The requested sentence would appropriately advance all of the § 3553(a) goals and would finally allow Mr. Avalo to begin the hard work of overcoming the various negative conditions that have affected him since he was a young child.

CONCLUSION

For all of the foregoing reasons, and in light of the factors to be discussed at the time of sentencing, it is respectfully submitted that Mr. Avalo be sentenced to a concurrent period of imprisonment, a reasonable period of supervised release, and a mandatory special assessment of $100. It is also respectfully requested that the Court recommend to the Bureau of Prisons that Mr. Avalo be designated to Fort Dix in order to facilitate his completion of electrician classes, as described in his letter attached under Exhibit A.

Dated: New York, New York
March 17, 2017

/s/

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